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# Chonmanee Laphathanawat v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05(M)-237–09 OF 2015
MOHTARUDIN BAKI, IDRUS HARUN AND ABDUL KARIM ABDUL JALIL JJCA
3 MARCH 2017

C

*Criminal Procedure — Dangerous drugs — Trafficking — Accused detained at airport with 80 packets of cocaine in stomach, intestines and vagina — Whether evidence and circumstances of case showed accused knew packets contained cocaine and not diamonds — Whether prosecution proved accused had mens rea possession* D *of the drug — Whether accused unable to rebut statutory presumption of trafficking — Dangerous Drugs Act 1952 s 37(da) — Whether accused's defence that cocaine packets were inserted into her body under duress unsupported by evidence and unbelievable — Whether accused failed to provide police with sufficient particulars to enable them to investigate her defence*

E

The appellant, who had 80 sausage-like packages of cocaine ('the packages') in her stomach, intestines and vagina when detained by police, was found guilty and sentenced to death by the High Court on a charge of trafficking in 689.1g of that drug pursuant to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the F DDA'). The prosecution adduced evidence that police officers on rounds at the arrival hall of the Penang International Airport detained the appellant after noticing that she was behaving in a nervous and suspicious manner and was walking slowly as if she was holding something back. When she confessed that she had swallowed something, the police took the appellant to hospital where, G over a period of four hours, she defecated several of the packages. Two packages were removed from her vagina. The packages contained 689.1g of cocaine in total. In her defence, the appellant claimed she had all the while thought the packages contained diamonds and not cocaine. She said that after two of her Thai friends, Wit and Wan, had told her that a person named Bord was willing H to pay a substantial fee if she was willing to smuggle diamonds from Brazil into Thailand, she accepted the offer and went on an all-expenses-paid trip to Brazil. While there, the appellant claimed, two men who were friends of Bord confined her in a house, and after threatening that she would be killed if she did not cooperate, forced her to swallow the packages and inserted them into her I vagina. She was then taken to the airport for a flight to Singapore, with a stop-over at Barcelona, Spain. From Singapore, she flew to Penang where she was arrested. The trial court found the appellant's story about Wit, Wan, Bord and the diamonds unbelievable; a bare assertion unsupported by any other evidence. The court found that if her story was true, she had a choice to find out

what it was that she was made to swallow or which was inserted in her vagina but she chose not to know. Her claim that she was under duress was also incomprehensible because from the time she was left at the airport at Brazil, the appellant was on her own and she had the opportunity to report her allegations to police but did not do so. Drawing inferences from all the evidence, the trial court concluded that the appellant knew full well that she was transporting the cocaine and that she was unable, on balance of probabilities, to rebut the presumption, under s 37(da) of the DDA, that she was trafficking in the drug. The appellant appealed against conviction and sentence.

**Held,** dismissing the appeal and affirming the conviction and sentence:

(1) The evidence which the appellant sought to adduce was no more than a mere attempt to convince the trial judge that she did not have custody and control of the sausage-shaped capsules, and did not have the knowledge, and thus possession, of the impugned drug therein which was one of the requisite elements of the offence with which she was charged. There was not a scintilla of doubt that the capsules were swallowed and were inserted into the appellant's vagina voluntarily (see para 33).

(2) From the surrounding circumstances of the case and based on the evidence, it could conclusively be inferred that the appellant had knowledge and was thus conscious of her actual possession of the cocaine contained in the capsules concealed in her stomach and vagina, that is to say, as the trial judge correctly held, independently of s 37(d) of the DDA. The trial judge was correct to find that the prosecution had proved the requisite element of possession. As the weight of the drug exceeded the statutory prescribed limit, the trial judge was also correct to hold that the presumption of trafficking under s 37(da) of the DDA applied. The appellant failed to rebut that presumption on balance of probabilities (see para 34).

(3) The appellant's version of duress was highly improbable. Her behaviour was inconsistent with the conduct of someone who was under duress. The so-called threat or duress would have dissipated from the moment the appellant was left to herself at Sao Paolo airport. She had ample opportunity from then on to seek help, to extricate herself or to seek protection or a safe avenue of escape (see paras 32–34 & 36–37).

(4) It was settled in our law that for the 'Alcontara Notice' to apply, the appellant had to provide sufficient and good particulars in the right perspective and not a vague notice where the prosecution would not be able to investigate to rebut the defence's story or version. The relevant information regarding Wit, Wan and Bord, such as their addresses and telephone numbers or any other information and details concerning them, were not provided by the appellant to the police at the earliest

A opportunity to enable them to investigate. As such, the appellant's argument on this aspect of her case collapsed (see paras 39 & 42).

(5) The appellant failed to raise a reasonable doubt in the prosecution's case while the prosecution had proved its case against the appellant beyond
B reasonable doubt (see para 43).

**[Bahasa Malaysia summary**

Perayu, yang mempunyai 80 bungkusan kokain yang berbentuk seperti sosej ('bungkusan') di dalam perut, usus dan farajnya apabila ditahan oleh polis,
C didapati bersalah dan dijatuhkan hukuman mati oleh Mahkamah Tinggi atas pertuduhan mengedar 689.1g dadah menurut s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Pendakwaan mengemukakan keterangan bahawa pegawai polis yang membuat rondaan di balai ketibaan Lapangan Terbang Pulau Pinang menahan perayu apabila menyedari dia berkelakuan cemas dan
D meragukan dan berjalan dengan perlahan seperti menahan sesuatu. Apabila dia membuat pengakuan bahawa dia telah menelan sesuatu, polis membawa perayu ke hospital di mana, dalam tempoh lebih empat jam, dia membuang beberapa bungkusan. Dua bungkusan dikeluarkan daripada farajnya. Bungkusan mengandungi 689.1 kokain secara keseluruhan. Dalam
E pembelaannya, perayu mendakwa bahawa dia telah selama ini menyangka bungkusan itu mengandungi berlian dan bukan kokain. Dia berkata bahawa setelah dua orang rakannya orang Thai, Wit dan Wan, telah memberitahunya bahawa seorang bernama Bord sanggup membayar fi yang besar jika dia sanggup untuk menyeludup berlian dari Brazil ke Thailand, dia menerima
F tawaran dan meneruskan perjalanan ditanggung sepenuhnya ke Brazil. Apabila di sana, perayu mendakwa, dua orang lelaki yang merupakan rakan Bord mengurungnya di dalam sebuah rumah, dan selepas mengugut yang dia akan dibunuh jika dia tidak bekerjasama, memaksa dia menelan bungkusan dan memasukkannya ke dalam farajnya. Dia kemudian dibawa ke lapangan
G terbang untuk penerbangan ke Singapura, dengan satu hentian di Barcelona, Spain. Dari Singapura, dia terbang ke Pulau Pinang di mana dia telah ditangkap. Mahkamah perbicaraan mendapati cerita perayu tentang Wit, Wan, Bord dan berlian adalah tidak boleh dipercayai, satu penegasan kosong disokong oleh apa-apa keterangan. Mahkamah mendapati bahawa jika
H ceritanya adalah benar, dia mempunyai pilihan untuk mengetahui apa yang dipaksa telan atau yang mana telah dimasukkan di dalam farajnya tetapi dia memilih untuk tidak mengambil tahu. Dakwaannya bahawa dia di bawah dures juga tidak boleh diterima kerana dari masa dia meninggalkan lapangan terbang di Brazil, perayu bersendiri dan mempunyai peluang untuk
I melaporkan dakwaannya kepada polis tetapi tidak berniat berbuat sedemikian. Membuat kesimpulan daripada semua keterangan, mahkamah perbicaraan menyimpulkan bahawa perayu mengetahui sepenuhnya dia membawa kokain dan bahawa dia tidak dapat, atas imbangan kebarangkalian, untuk mematahkan anggapan, di bawah s 37(d) ADB, yang dia mengedar dadah.

Perayu merayu terhadap sabitan dan hukuman. A

**Diputuskan,** menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Keterangan yang mana perayu pohon untuk kemukakan adalah hanya satu cubaan semata-mata untuk menyakinkan hakim perbicaraan bahawa dia tidak mempunyai jagaan dan kawalan terhadap kapsul berbentuk sosej, dan tidak mempunyai pengetahuan dan oleh itu milikan, dadah yang dipersoalkan itu yang merupakan satu keperluan elemen kesalahan yang mana dia telah dituduh. Tiada sedikit keraguan bahawa kapsul telah ditelan dan dimasukkan ke dalam faraj perayu secara sukarela (lihat perenggan 33). B C

(2) Dari keseluruhan keadaan kes dan berdasarkan keterangan, ia boleh disimpulkan bahawa perayu mempunyai pengetahuan dan oleh itu sedar akan milikan sebenar kokain terkandung di dalam kapsul yang disembunyikan di dalam perut dan farajnya, ia boleh dikatakan, seperti yang diputuskan dengan betul oleh hakim perbicaraan, secara bebas s 37(d) ADB. Hakim perbicaraan adalah betul untuk mendapati bahawa pendakwaan telah membuktikan keperluan elemen milikan. Memandangkan berat dadah melebihi had statutori yang ditetapkan, hakim perbicaraan juga betul untuk memutuskan bahawa anggapan pengedaran di bawah s 37(da) ADB terpakai. Perayu gagal untuk mematahkan anggapan itu atas imbangan kebarangkalian (lihat perenggan 34). D E

(3) Versi dures perayu adalah amat tidak mungkin. Kelakuannya tidak konsisten dengan kelakuan seseorang di bawah dures. Ancaman atau dures yang dikatakan akan hilang bermula dari masa perayu ditinggalkan sendirian di Lapangan Terbang Sao Paolo. Dia mempunyai peluang yang mencukupi dari situ untuk meminta bantuan, untuk membebaskan dirinya atau untuk memohon perlindungan atau satu tempat selamat untuk melepaskan diri (lihat perenggan 32–34 & 36–37). F G

(4) Adalah undang-undang tetap Malaysia bahawa untuk 'Alcontara Notice' terpakai, perayu perlu mengemukakan butiran yang cukup dan bagus dalam perspektif yang betul dan bukan notis samar yang mana pendakwaan tidak akan dapat untuk menyiasat untut mematahkan cerita atau versi pembelaan. Maklumat relevan berkaitan Wit, Wan dan Bord, seperti alamat dan nombor telefon mereka atau apa-apa maklumat dan butiran lain berkaitan mereka, tidak dikemukakan oleh perayu kepada polis di awal peluang untuk membolehkan mereka membuat siasatan. Oleh itu, hujahan perayu atas aspek ini terhadap kesnya gagal (lihat perenggan 39 & 42). H I

(5) Perayu gagal untuk menimbulkan satu keraguan munasabah dalam kes pendakwaan manakala pendakwaan telah membuktikan kes terhadap

perayu melampaui keraguan munasabah (lihat perenggan 43).]

**Notes**

For cases on trafficking, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2178–2187.

**Cases referred to**

*Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)
*Balachandran v PP* [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
*Chan Pean Leon v PP* [1956] 1 MLJ 237 (refd)
*Chu Tak Fai v PP* [1998] 4 MLJ 246, FC (folld)
*Emmanuel Yaw Teiku v PP* [2006] 5 MLJ 209, FC (refd)
*Fun Seong Cheng v PP* [1997] 3 SLR 523, CA (refd)
*Gunalan a/l Ramachandran & Ors v PP* [2004] 4 MLJ 489, CA (refd)
*Hossein Shakeri v PP and other appeals* [2014] 3 MLJ 292, CA (refd)
*Ibrahim Mohamad & Anor v PP* [2011] MLJU 1491; [2011] 4 CLJ 113, FC (refd)
*Marimuthu a/l Seringan v Pendakwa Raya* [2016] MLJU 1561; [2016] 1 LNS 64, CA (refd)
*Mat v PP* [1963] 1 MLJ 263 (refd)
*Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169; [1991] 1 CLJ Rep 311, CA (refd)
*Pendakwa Raya v Mohammad Javad Saberi Gholamreza* [2015] MLJU 2144; [2015] 1 LNS 548, CA (refd)
*PP v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)
*PP v Badrulsham bin Baharom* [1988] 2 MLJ 585 (refd)
*PP v Lim Hock Boon* [2009] 3 MLJ 604; [2009] 3 CLJ 430, FC (refd)
*PP v Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576, HC (refd)
*PP v Saimin & Ors* [1971] 2 MLJ 16 (refd)
*Ramis a/l Muniandy v PP* [2001] 3 SLR 534, CA (refd)
*Teh Hock Leong v PP* [2008] MLJU 284; [2008] 4 CLJ 764, CA (refd)
*Teng Howe Sing v PP* [2009] 3 MLJ 46; [2009] 3 CLJ 733, FC (refd)
*Toh Ah Loh and Mak Thim v Rex* [1949] 1 MLJ 54 (refd)

**Legislation referred to**

Criminal Procedure Code s 182A
Dangerous Drugs Act 1952 ss 2, 37(d), (da), 37A(1)(b), 39B, 39B(1)(a), (2), First Schedule
Evidence Act 1950 ss 8, 9

**Appeal from:** Criminal Trial No 45A-3–01 of 2014 (High Court, Pulau Pinang)

*Mohd Ismail bin Mohamad (Ismail Khoo & Assoc) for the appellant.*
*Hanim bt Mohd Rashid (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

**Idrus Harun JCA (delivering judgment of the court):**

INTRODUCTION

**[1]** The appellant in this appeal was tried under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act 234') for an offence of trafficking in dangerous drug involving 689.1g of cocaine which was punishable under s 39B(2) of the same Act. She was found guilty of the offence by the High Court and was condemned to death. The appeal before this court is against the order of such conviction and sentence. The charge against the appellant is stated in the following terms:

> Bahawa kamu di antara 13.2.2013 jam lebih kurang 8.45 malam sehingga 16.2.2013 jam lebih kurang 0050 hrs bertempat di Hospital Besar Pulau Pinang di dalam Daerah Timur Laut, dalam Negeri Pulau Pinang telah mengedar dadah berbahaya berjumlah 689.10 gram cocaine dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

CASE FOR THE PROSECUTION

**[2]** The facts to the extent that they are central to the appeal appear sufficiently in the judgment of the High Court delivered by Nordin Hassan JC. We do not propose to repeat them here save to state briefly the following evidence that lie at the core of this appeal. On 13 February 2013 circa 5.10pm, Sgt Rozita Md Zaki ('PW5') and several other police personnel were conducting a surveillance at the international arrival hall of Penang International Airport. PW5 saw the appellant, who at that material time was behaving suspiciously and appeared to be nervously looking around at the said arrival hall. She was also seen walking slowly as if she was holding back something. PW5 then detained the appellant and took her to the police narcotics office at the airport for a search. However, nothing incriminating was found upon the search conducted on her person and luggage. The appellant nevertheless informed PW5 that she had swallowed something. The appellant was thereupon handed over to Insp Mohd Kamal bin Abdul Wahab ('PW7') at 7pm on the same evening.

**[3]** The appellant was subsequently taken by PW17 to Penang Hospital for medical examination. At approximately 8.45pm, whilst at the hospital's x-ray room, the appellant informed the police that she wanted to defecate whereupon she was taken to the toilet accompanied by two police personnel namely PW7 and PW13. The evidence revealed that at the time in question the

appellant discharged 11 sausage-like packages or capsules from her bowels. At 9.55pm, the x-ray conducted on the appellant by a medical officer showed more of these sausage-like packages in her abdomen and intestines. Between 11.25pm on the same day until 12.50am on 16 February 2013, the appellant excreted another 68 sausage-like packages. Two sausage-like packages, one of which was bigger in size than the other, were recovered from her vagina. Thus all together, 80 sausage-like packages were recovered between 8.45pm on 13 February 2013 until 12.50am on 16 February 2013 from the appellant.

**[4]** All these 80 sausage-like packages were handed over to PW17 at the Penang Hospital who in turn handed them over to the investigating officer of the case, PW18. These packages were in due course sent by PW18 to the chemist, PW2, for analysis. The evidence of PW2 confirmed that on analysis the substances in the packages were 'cocaine' with the net weight of 689.1g. Cocaine is comprised in the First Schedule to Act 234 and therefore is dangerous drug as defined in s 2 thereof ('exhs P83–P94').

FINDINGS OF THE HIGH COURT AT THE CLOSE OF CASE FOR THE PROSECUTION

**[5]** The learned judge correctly stated the law that in order to prove a prima facie case against the appellant for the offence of trafficking in dangerous drug namely cocaine under s 39B(1)(a) of Act 234, the prosecution needed to prove the element of possession and trafficking of the impugned drug. From the judgment of Thomson J in the case of *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237 in which it was stated that there could be no possession without knowledge and some power of disposal, the learned judge in the instant case reproduced the following excerpt on the meaning of possession:

> *'Possession'* itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Ed page 304): '*A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need*'. (Emphasis added.)

**[6]** Further, the Federal Court in *Ibrahim Mohamad & Anor v Public Prosecutor* [2011] MLJU 1491; [2011] 4 CLJ 113 explained the issue of possession stating that:

> The law is well settled that having only custody or control over the said drugs is insufficient to establish 'possession'. *The physical act of custody or control must be accompanied with evidence that the accused had knowledge of the said drugs. In the absence of any statutory presumptions, knowledge has to be proved either by direct evidence or circumstantial evidence.* Mere knowledge alone without exclusivity of either physical custody or control or both is insufficient in law to constitute, possession let alone trafficking. (Emphasis added.)

**[7]** The learned judge accepted the uncontroverted evidence that the impugned drug was excreted by the appellant from her anus and also recovered from her vagina. Naturally the learned judge reached a finding that the element of custody and control of the drug by the appellant was established. And as regards the element of physical control of the drug, the learned judge cited the Federal Court's case of *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337 as the authoritative pronouncement that to prove the said element the prosecution must show that the appellant possessed the requisite knowledge as to the contents of the packages or capsules the appellant was carrying and that the mental state of knowledge or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses.

**[8]** The manner in which the dangerous drug was carried by the appellant, according to the learned judge could also show knowledge about the impugned drug as decided in *Teh Hock Leong v Public Prosecutor* [2008] MLJU 284; [2008] 4 CLJ 764 in which this court had this to say:

> [8] Turning to the facts of the present instance, we agree with the learned trial judge *that the method employed to bring the drugs in question from Thailand into Malaysia was done in a most cunning fashion to escape detection by the authorities. The method employed to convey or transport a drug may sometimes furnish evidence of knowledge*. For example an attempt to carefully conceal a drug may indicate an intention to avoid detection and thereby point to knowledge of course if all defends on the facts of each individual case. (Emphasis added.)

**[9]** Besides, once it was shown that the impugned drug was under physical control of the appellant, the inference was that the appellant had knowledge of the drug in question in the absence of any reasonable explanation from her. The learned judge referred to the case of *Ramis a/l Muniandy v Public Prosecutor* [2001] 3 SLR 534 in support of the above proposition. We reproduce the relevant extract of the judgment in *Ramis a/l Muniandy*, below:

> The starting point in the consideration of the issue was that we had already concluded that the drugs was already on Ramis' motorcycle when he entered the vicinity and that he had physical control of the drugs. In the absence of any reasonable explanation by Ramis, these facts were sufficient to lead to a strong inference that Ramis knew that the bag found on his motorcycle contained drugs.

**[10]** Thus, the learned judge considered PW5's evidence which showed that the appellant appeared to be suspicious, nervous and was seen looking around upon arrival at the arrival hall of the airport in Penang. His Lordship then drew an inference that, from this evidence of conduct which was a relevant fact admissible under s 8 of the Evidence Act 1950, the appellant knew that she was carrying the impugned drug. The appellant could have explained her conduct pursuant to s 9 of the Evidence Act 1950 but failed to do so.

**[11]** The manner in which the drug was concealed in the appellant's vagina and stomach had also raised an inference that the appellant knew that it was a serious offence to traffick in the impugned drug. It was consequently held that the appellant's knowledge about the drug was proven even without invoking the presumption under s 37(d) of Act 234.

**[12]** The learned judge had also taken into account the appellant's cautioned statement ('exh D126') touching on three individuals namely Bord, Wit and Wan. In his ruling, the learned judge found that there was no clear information regarding these individuals provided by the appellant to the police during investigation. Bord, according to the learned judge was a dark-skinned male whom the appellant came to know through internet whereas Wit and Wan were female Thai nationals. In the absence of sufficient information such as their addresses and telephone numbers which would enable PW18 to carry out further investigation regarding the roles of these individuals, the learned judge held that the situation in the instant case was therefore different from the facts in the case of *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705 where the investigating officer was given the name and telephone number of one Mat at the time of the accused's arrest.

**[13]** The learned judge ruled that, as the weight of the drug was 869.1g, which exceeded the statutory prescribed weight, the presumption under s 37(da) of Act 234 applied that is the appellant was presumed to be trafficking in the said dangerous drug unless the contrary was proved by the appellant. Having considered the evidence adduced by the prosecution, the learned judge found that the prosecution had successfully established a prima facie case against the appellant on the charge. The appellant was consequently called upon to enter on her defence.

## THE DEFENCE

**[14]** Besides the appellant who tendered herself as a witness, no other witnesses were called by the defence. Essentially, in her evidence, the appellant testified that her friend Bord, had offered her to collect diamonds from Brazil to be brought to Thailand for which she was promised payment of 70,000 Bahts when she returned to Thailand bringing the said diamonds. All travelling and accommodation expenses would be borne by Bord. The appellant accepted Bord's offer. On 6 February 2013, the appellant departed from Bangkok for Frankfurt and then Moscow, where she stayed overnight. On 7 February 2013, the appellant received instructions from Bord via telephone to return to Frankfurt. Bord had also told the appellant to ensure that her handphone was switched on when she reached Frankfurt. Bord then informed the appellant that there was a flight ticket from Frankfurt to Brazil which was kept in the bag she was carrying. She returned to Frankfurt on the same day.

**[15]** The appellant boarded a plane in Frankfurt bound for Sao Paolo, Brazil on 8 February 2016 and stayed in a hotel in Sao Paolo on arrival. At the hotel, the appellant met a dark-skinned man who was a friend of Bord. The man told the appellant not to leave the said hotel. On 10 February 2013, the man took the appellant to a bus station in Sao Paolo from which she was brought to a place some one hour bus journey away. The appellant was taken to a house and was asked to go inside. She was then locked from outside by the said man. The man later returned to the house with another dark-skinned friend. Both of them then blindfolded the appellant and asked her to swallow round shaped objects. She was threatened to be killed if she refused to do so. The appellant proceeded to swallow the round shaped objects over a period of four hours, from 8pm to 12 midnight. After swallowing all the round shaped objects, the appellant was asked to swallow four pills after which she felt drowsy and fell asleep. When she woke up the two men proceeded to insert something into her vagina. The appellant fell asleep again and woke up on the next day. The appellant further testified that she was informed by the dark-skinned man that the round-shaped objects which she had swallowed were diamonds.

**[16]** On the same day, that is 11 February 2013, the appellant was brought to Sao Paolo airport where she was given a flight ticket from Brazil to Singapore, and transiting in Barcelona, Spain. The appellant arrived in Barcelona on 12 February 2013 and thereafter in Singapore in the morning of 13 February 2013. At 2pm, the appellant boarded a flight to Penang and arrived at Penang International Airport approximately at 5pm where her journey ended with her arrest by the police. The appellant claimed that she did not know that the objects she swallowed contained cocaine as she thought they were actually diamonds.

DECISION OF THE TRIAL JUDGE AT THE CONCLUSION OF THE TRIAL

**[17]** The learned judge stated that the defence of the appellant was that she was forced to swallow the impugned drug and that she had no knowledge of the objects which she had swallowed and were inserted into her vagina contained dangerous drug. She was under the impression that the objects were diamonds. In other words, the defence had raised the question whether the appellant was an innocent carrier.

**[18]** The learned judge did consider whether the appellant had gone to Brazil to collect diamonds and brought it back to Thailand as offered by Bord in consideration of the payment of 70,000 Bahts. The appellant, it is to be observed, testified that Bord was in the business of selling diamonds and watches. However, the learned judge found that except for her words, there was no other oral or documentary evidence that would support her evidence that

Bord was in the business of selling diamonds and watches. The appellant had also confirmed that she had no experience in this business yet she was offered by Bord to bring diamonds back to Thailand without stating how the diamonds should be brought to Thailand. Moreover, there were no details provided to her relating to the place where she would collect the alleged diamonds in Brazil, whom she would have to contact in Brazil, the price to be paid and quality of diamonds to be purchased and documents which she was supposed to bring for the purpose of the transaction.

**[19]** After evaluating the evidence, the learned judge found for a fact that the real reason the appellant went to Brazil was not to collect the so called diamonds. The appellant had a choice to find out what were the objects she had swallowed and were inserted into her vagina. Yet she chose not to know. An inference was drawn by the learned judge that the appellant knew the real purpose of her trip to Brazil, which was to collect and bring back the impugned drug to Thailand by concealing it in her abdomen and vagina.

**[20]** The evidence showed that the appellant's subsequent conduct did not support her allegation that she acted under duress when she swallowed the impugned drug and when the drug was inserted into her vagina. According to the learned judge, when the appellant was at Sao Paolo airport for one hour and 45 minutes, the appellant had seen police personnel there yet she did not report to the police on the alleged threat and duress by the two dark-skinned men neither did she do so while in transit at Barcelona and Singapore airports. The appellant also did not make a report to the aircraft crew while on board the aircraft en route to Barcelona, Singapore and Penang.

**[21]** Further, when the appellant told PW5 that she swallowed something, she did not tell PW5 that she had swallowed diamonds. The learned judge also considered an important piece of evidence regarding the impugned drug in the appellant's vagina which according to His Lordship, the appellant could have examined the contents of the two sausage-like packages one of which was bigger in size yet she chose not to do so. The appellant's wilful blindness in this case, the learned judge found, did not help her, instead it gave rise to an inference that she knew the packages contained cocaine.

**[22]** The learned judge therefore held that the defence failed to rebut the presumption of trafficking in s 37(da) of Act 234 on the balance of probabilities. As the quantity involved was large the drug was not intended for her own personal consumption. Having evaluated the evidence, the learned judge rejected the defence evidence that the appellant did not have knowledge that the substance she carried was dangerous drug. The appellant was found guilty and sentenced to death.

OUR DELIBERATION AND DECISION

**[23]** As a necessary preliminary, we begin by stating the obvious, that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the appellant for the offence with which the appellant was charged. We bear in mind the test and the correct law on onus of proof for the trial judge to apply at a criminal trial as lucidly expressed by the Supreme Court in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 1 CLJ Rep 311 as well as the time honoured authoritative guidelines laid down in *Mat v Public Prosecutor* [1963] 1 MLJ 263 repeated and applied by our courts. The law may now seem obvious and trite and so ingrained in our criminal law that it does not need any explanation or restatement herein. Suffice for us to state that for the purpose of proof, the requisite elements of the offence of trafficking of dangerous drug which the prosecution is required to prove are these:

(a) the appellant at the relevant date and time and the place in question had trafficked in the said dangerous drug;

(b) the appellant was in possession of the said dangerous drug; and

(c) the drug specified in the charge is dangerous drug which is comprised in the First Schedule to Act 234 as defined in s 2 of the same Act.

**[24]** Having established a prima facie case, it would be the duty of the trial judge to determine whether the appellant's defence had managed to cast a reasonable doubt in the prosecution's case (*Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85). The definition of 'reasonable doubt', as explained by Sharma J in the case of *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16, merits our reference:

> It has again been said that "reasonable doubt' is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your consciences, after you have fully investigated the evidence and compared it in all its parts, you say to yourself I doubt if he is guilty, then it is a reasonable doubt. It is a doubt which settles in your judgment and finds a resting place there'. Or as sometimes said, it must be a doubt so solemn and substantial as to produce in the minds of the jurors some uncertainty as to the verdict to be given. A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence.

**[25]** Similarly in the case of *Pendakwa Raya v Mohammad Javad Saberi Gholamreza* [2015] MLJU 2144; [2015] 1 LNS 548 this court in the judgment of Mohd Zawawi Salleh JCA said:

> [38] In *Jagatheesan s/o Krishnasamy v PP* [2006] 4 SLR 45, VK Rajah J explained the doctrine of reasonable doubt in the following terms:

> 61. To summarise, the prosecution bears the burden of proving its case beyond reasonable doubt. While this does not mean that the Prosecution has to dispel all conceivable doubts, the doctrine mandates that, at the very least, those doubts for which there is a reason that is, in turn, relatable to and supported by the evidence presented, must be excluded. Reasonable doubt might also arise by virtue of the lack of evidence submitted, when such evidence is necessary to support the Prosecution's theory of guilt. Such a definition of reasonable doubt requires the trial judge to apply his mind to the evidence; to carefully sift and reason through the evidence to ensure and affirm that his finding of guilt or innocence is grounded entirely in logic and fact. A trial judge must also bear in mind that the starting point of the analysis is not neutral. An accused is presumed innocent and this presumption is not displaced until the Prosecution has discharged its burden of proof. Therefore, if the evidence throws up a reasonable doubt, it is not so much that the accused should be given the benefit of the doubt as much as the Prosecution's case simply not being proved. In the final analysis, the doctrine of reasonable doubt is neither abstract nor theoretical. It has real, practical and profound implications in sifting the innocent from the guilty; in deciding who should suffer punishment and who should not. The doctrine is a bedrock principle of the criminal justice system in Singapore because while it protects and preserves the interests and rights of the accused, it also serves public interest by engendering confidence that our criminal justice system punishes only those who are guilty.
>
> [39] We are satisfied that the learned trial judge's approach in dealing with the defence case is correct, ie, whether the respondents explanation had cast a reasonable doubt on the prosecution's case (see *PP v Mohd Radzi Abu Bakar* [2006] 1 CLJ 457).

**[26]** The appeal turns upon a pure question of fact. The appellant's defence, can be neatly summarised as follows:

(a) that she was forced to swallow the sausage-like objects;

(b) that she had no knowledge that the objects swallowed by her and inserted into her vagina were dangerous drugs;

(c) that she thought the objects were diamonds; and

(d) that the appellant was an innocent carrier.

**[27]** The main bone of contentions as learned counsel had indicated to us at the commencement of the hearing of this appeal arose from the appellant's allegation of duress in connection with her evidence that she was forced to swallow the capsules and of the insertion of the two capsules into her vagina. Before proceeding further, we may mention at this stage that the evidence of PW2 conclusively proved the substances found in the 80 sausage-like packages contained cocaine with the net weight of 689.1g. Cocaine as earlier stated is

comprised in the First Schedule to Act 234. Hence, the third requisite element of the offence as we have stated a moment ago had been proved by the prosecution.

**[28]** It is clear in the authorities that to prove possession, the prosecution must show that the appellant had custody or control of the impugned drug. This is the requirement that entails a further burden on the prosecution to prove that the appellant knew the nature of the impugned drug she possessed, she had a power of disposal thereof and was conscious of her possession of the same (see *Chan Pean Leon v Public Prosecutor*; *PP v Abdul Rahman Akif*; *Toh Ah Loh and Mak Thim v Rex* [1949] 1 MLJ 54; *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585; *Fun Seong Cheng v Public Prosecutor* [1997] 3 SLR 523 and *Public Prosecutor v Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576). It remains a good and trite law for this court to say that the evidence of only custody or control over the said drugs is insufficient to establish possession, such physical act of custody or control must be accompanied with evidence that the appellant had knowledge of the said drug (*Ibrahim Mohamad & Anor v Public Prosecutor*).

**[29]** Mindful of the above well established principle, we were fully satisfied that the learned judge correctly considered the manner in which the impugned 80 capsules containing cocaine inside the stomach and vagina of the appellant showed that the appellant had knowledge of what she was carrying. The learned judge said:

> [79] Berdasarkan penilaian keterangan yang dikemukakan, saya membuat dapatan fakta bahawa tujuan sebenar tertuduh ke Brazil adalah bukan untuk membawa balik berlian dari Brazil ke Thailand. Tertuduh langsung tidak mengambil tahu apakah objek-objek yang ditelan dan dimasukkan dalam kemaluannya di mana tertuduh mempunyai pilihan untuk memeriksanya. Ini semua membolehkan inferen dibuat bahawa tertuduh mengetahui tujuan tertuduh ke Brazil adalah untuk membawa balik dadah berbahaya secara menyembunyikan dadah-dadah tersebut dalam perut dan kemaluannya.

It must be emphasised that the learned judge had also found that the irrefragable evidence revealed that the impugned drug was excreted and recovered from the appellant's anus and vagina respectively.

**[30]** Reference in this connection may be made to several authorities one of which is the case of *Emmanuel Yaw Teiku v Public Prosecutor* [2006] 5 MLJ 209, where the defence of the appellant in this case was a denial of any knowledge of the drug that the appellant had swallowed and that he was told that the capsules contained gold dust, the Federal Court had this to say:

> On the issue of knowledge of the appellant as to the contents of the capsules, the Court of Appeal said in its judgment:

> ... it is clear to us that knowledge of the appellant in respect of the 84 capsules containing the drug, could only be inferred from his behaviour and the surrounding circumstances as at the close of the prosecution's case. We see no reason why the learned trial judge in the present appeal should not make the necessary inferences as he had stated in the above passages. It is trite law that knowledge could not be seen but could be inferred from one's behaviour.
>
> ...
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> We agreed with the learned trial judge that the reluctance of the appellant to have his abdomen x-rayed was because he knew of the contents of the capsules. It was obvious that the swallowing of 84 capsules could not be mistaken with the swallowing of medicines because of the large quantity of capsules swallowed. It is obvious to us that he was not forced to swallow those capsules. In our view, the appellant must have swallowed those capsules himself which show that he had handled the capsules himself. In our view, the learned judge came to the correct conclusion after evaluating the evidence that the appellant knew what were the contents in those capsules.
>
> ...
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> ...
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> ...

In fact, on the subject of actual possession vis a vis the act, we need only to refer to some instructive cases. In *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259, this court had this to say:

> There is no dispute about the central facts relating to the possession of the drugs. It was established by the evidence and accepted by the learned judge that the drugs in question were found in packets within the stomachs of the appellants. Each appellant had swallowed a packet containing the drug. The learned trial judge found the appellants' version of how they had come to swallow the drugs in question as being implausible. The totality of the evidence reasonably supports the conclusion that the appellants were in actual possession of the prescribed drug at the time of their initial detention. It follows that even if the learned trial judge and the learned judges of the Court of Appeal had directed themselves in accordance with the law as laid down by the court in *Muhammed bin Hassan* they would have arrived at the identical conclusion. To put it in another fashion, a reasonable tribunal arrived with the same facts and properly directing itself would have concluded that the appellants were found in actual possession of the heroin in question, that is to say, independently of the presumption in s 37(d) of the Act. Since the quantity so found in the possession of appellants was several times greater than the statutory minimum of 15g, the court was entitled to conclude that they were trafficking in the said drug.

**[31]** In fact the Court of Appeal in *Hossein Shakeri v Public Prosecutor and other appeals* [2014] 3 MLJ 292 went as far as stating that even without invoking s 37(d) of Act 234, knowledge could easily be inferred from the surrounding circumstances when it held:

We find on the facts and circumstances of the present case, relying on the conduct of swallowing voluntarily, would entitle the court to infer knowledge. There are decided cases of similar nature where the accused swallowed drugs, such as the Federal Court case of *Emmanuel Yaw Teiku v Public Prosecutor* [2006] 5 MLJ 209; [2006] 3 CLJ 567, the Court of Appeal decision in *Kasanda Emmanuel v Public Prosecutor* [2013] 2 MLJ 833 as well as *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259, which state this legal proposition. In all these cases the drugs were also found in the abdomens.

In *Teh Hock Leong v Public Prosecutor* [2010] 1 MLJ 741; [2008] 4 CLJ, it was held by the Federal Court that the method employed to convey or transport the drugs furnish evidence of knowledge. In this regard, SP9 (Dr Siti Jusna @ Siti Sharifah bt Muhammad, a radiologist) testified that the capsules discharged were *ketulan bujur objek putih* sausage shape *dan sekeliling objek ada jalur hitam*. All the three appellants swallowed these capsules voluntarily and in our view these surrounding facts inferred that the appellants know that they swallowed capsules of drugs.

Given the facts as they are, we agree with the learned DPP (En Yusaini Amer bin Abd Karim) that there was no necessity to invoke any presumption on knowledge. It must be emphasised that the strict requirement knowledge on the part of the appellants must be qualified by the doctrine of willful blindness. It is a doctrine where if a person shuts his eyes to the obvious simply because he does not want to know, he must be taken to know what he is doing, (see *Public Prosecutor v Hla Win* [1995] 2 SLR 424). The appellants in saying that they were not aware of what they were swallowing, cannot set aside the doctrine of willful blindness because they have opportunity to find out what they were swallowing. If they chose not to then the law cannot be seen to protect their own folly. Therefore on the facts and circumstances of this case, even without invoking s 37(d) of the DDA, knowledge can be easily inferred from these surrounding facts.

In the instant appeal, PW5 had testified that the appellant had acted in suspicious manner when she arrived at the arrival hall. She was nervous, walked too slowly as if she was withholding something, and was also seen looking around as if she was looking out for someone. This conduct of the appellant had prompted PW5 to conduct a further search upon the appellant. Thus, having been apprised of the entire facts and surrounding circumstances, we could safely say that the learned judge had not erred in concluding that the appellant's voluntary act of swallowing the capsules showed knowledge on her part that the sausage-like capsules contained cocaine.

**[32]** Learned counsel touched on the appellant's evidence that she was threatened to be killed if she failed to follow the instructions of Bord and submitted that PW18 did not investigate this aspect of the defence evidence. We would, in dealing with this issue, emphasise that in her evidence, the appellant stated that she travelled alone from Brazil to Penang. She transited at Barcelona and Singapore before taking the flight to Penang. The journey according to the appellant spanned over two days from 11–13 February 2013. It was evident that after she was dropped at the airport in Sao Paolo she was no

longer under the control and watch of the two men. The evidence gleaned from the appeal records showed that the appellant was at the said airport for one hour and 45 minutes where she admitted that she saw police personnel. We would not for a moment hesitate to say that if indeed she was under duress, she had ample time while at the Sao Paolo airport to inform the relevant authorities of her condition. However, she chose not to do so. Likewise, while at the airport in Barcelona and Singapore and even when she was on board the aircraft she could have informed the authorities and aircraft crew that she had gotten herself into quite a serious predicament. The so called threat or duress in our view would have dissipated the moment the appellant was left to herself at Sao Paolo airport. In fact, the fact that the appellant had purportedly swallowed what she believed to be 'diamonds' was also not disclosed when she was arrested by PW5 at the airport in Penang. This is the behaviour which we would say we could not otherwise apprehend and at the same time is inconsistent with the conduct of someone who was at one point of time under the threat of being killed.

**[33]** What we could make out from the above evidence was that the evidence which the defence sought to adduce was no more than a mere attempt to convince the trial judge that she did not have custody and control of the sausage-shaped capsules, knowledge and thus possession of the impugned drug therein which is one of the requisite elements of the offence with which the appellant was charged. There was not a scintilla of doubt in our minds that the capsules were swallowed and inserted into the appellant's vagina voluntarily.

**[34]** Always mindful of the decision in *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; *Public Prosecutor v Lim Hock Boon* [2009] 3 MLJ 604; [2009] 3 CLJ 430 and *PP v Abdul Rahman Akif*, which have impressed upon us on the oft repeated pronouncement that knowledge is to be inferred from the facts before and at the time of the arrest of the appellant and the surrounding circumstances of the case, we found the defence version of duress to be highly improbable. Accordingly, from the surrounding circumstances of the case and based on the evidence, it could conclusively be inferred that the appellant had knowledge and was thus conscious of her actual possession of the drug in question contained in the capsules concealed in her stomach and vagina that is to say, as the learned judge correctly held, independently of s 37(d) of Act 234. We have no hesitation therefore to hold that the learned judge was correct when His Lordship found that the requisite element of possession was proved by the prosecution. Now, with respect to the element of trafficking, we also agreed with the learned judge that as the weight of the drug was 869.1g, which exceeded the statutory prescribed weight, the presumption under s 37(da) of Act 234 applied. The appellant shall therefore be presumed to be trafficking in the said dangerous drug until the contrary was proved by the appellant. The appellant apparently had difficulty to the point of

an impossibility and in fact had failed to rebut the presumption under s 37(da) of Act 234 on the balance of probabilities based on her evidence which we found, was embellished with total untruths. The defence of duress therefore had lost its bite and must be rejected.

**[35]** Similarly, the learned judge had also observed that the appellant's story that she was forced to swallow the capsules were neither believable nor truthful. His Lordship correctly said:

> [80] Selain itu, setelah tertuduh dikatakan dipaksa menelan objek-objek bulat dan dimasukkan objek-objek ke dalam kemaluannya, pembuatan tertuduh selanjutnya tidak menunjukkan tertuduh seperti dipaksa atau diugut berbuat demikian. Perbuatan dan tindakan tertuduh tersebut adalah seperti berikut:
>
> (a) pada 11 Februari 2013 semasa berada di Lapangan Terbang Sao Paolo selama 45 minit hingga satu jam, tertuduh ada melihat anggota polis di situ tetapi tidak melaporkan kepada pihak polis berhubung ugutan dan paksaan oleh dua lelaki hitam berkenaan. Tertuduh juga tidak memaklumkan kepada sesiapa mengenai objek-objek yang dimasukkan dalam kemaluannya;
>
> (b) tertuduh juga tidak melaporkan kepada krew penerbangan dalam penerbangan dari Sao Paolo ke Barcelona;
>
> (c) semasa transit di Lapangan Terbang Antarabangsa Barcelona juga tertuduh tidak melaporkan ugutan atau paksaan ini kepada mana-mana krew penerbangan dari Barcelona ke Singapura; dan
>
> (d) begitu juga tiada laporan dibuat kepada pihak penguatkuasa di Lapangan Terbang Antarabangsa Singapura atau krew penerbangan dari Singapura ke Pulau Pinang.
>
> [81] Tertuduh hanya memberitahu WP5 bahawa tertuduh ada menelan sesuatu hanya setelah ditahan oleh WP5 di Lapangan Terbang Antarabangsa Pulau Pinang apabila tertuduh dilihat dalam keadaan mencurigakan. Tertuduh juga tidak menyatakan kepada WP5 bahawa tertuduh telah menelan berlian.
>
> [82] Oleh itu, perbuatan atau tindakan tertuduh seperti yang dinyatakan amat bertentangan dengan perbuatan seseorang yang telah diugut atau dipaksa seperti yang ditegaskan oleh tertuduh.

**[36]** Obviously, the appellant's behaviour as earlier stated, was inconsistent with the conduct of someone who was under duress. Our finding is supported by the decision of this court in the case of *Chu Tak Fai v Public Prosecutor* [1998] 4 MLJ 246. Denis Ong JCA delivering the judgment of the court said:

> It has been said by the House of Lords in *Director of Public Prosecutions for Northem Ireland v Lynch* [1975] AC 653, per Lord Morris of Borth-y-Gest that (at p 668):
>
> > Where duress is in issue many questions may arise such as whether threats are serious and compelling or whether (as on the facts of the present case may especially call for consideration) a person the subject of duress could reasonably

A have extricated himself or could have sought protection or had what has been called a 'safe avenue of escape'.

And the Court of Appeal in *R v Sharp* [1987] QB 853 said, per Lord Lane CJ (at p 857):

B No one could question that if a person can avoid the effects of duress by escaping from the threats, without damage to himself, he must do so. In other words, if there is a moment at which he is able to escape, so to speak, from the gun being held at his head by Hussey, or the equivalent of Hussey, he must do so.

In *R v Hudson; R v Taylor* [1971] 2 QB 202, Lord Parker CJ said (at p 206):

C This appeal raises two main questions: first, as to the nature of the necessary threat and, in particular, whether it must be 'present and immediate'; secondly, as to the extent to which a right to plead duress may be lost if the accused has failed to take steps to remove the threat as, for example, by seeking police protection.

D And at p 207 he continued:

In the opinion of this court it is always open to the crown to prove that the accused failed to avail himself of some opportunity which was reasonably open to him to render the threat ineffective, and that upon this being established the E threat in question can no longer be relied upon by the defence.

From these excerpts quoted, *it would be observed that one issue which the trial court must consider was whether there was opportunity which was reasonably open to the appellant in our present case, to render the death threat to himself ineffective, by a safe avenue of escape or by seeking police protection*.

F ...

...

...

G *And his right to plead duress might be lost if the appellant failed to take steps to remove the threat by seeking police protection*. (Emphasis added.)

**[37]** Ergo, it is legitimate at this stage to have regard to the fact that the appellant could have extricated herself or could have sought protection or a safe H avenue of escape. Further, the appellant had ample opportunity to seek help. Her life was no longer in danger by the time she was at the airport in Sao Paolo. Why did not she inform the airline crew of her predicament when she was on board the aircraft as she was no longer under threat? There should be no hesitation to seek help from the authorities at Penang airport as soon as the I appellant disembarked from the aircraft.

**[38]** A final point needs to be made. It is to be remembered that in her testimony the appellant claimed Wit and Wan were Bord's friends. The appellant stated in her cautioned statement recorded under s 37A(1)(b) of Act

234 (exh D126), that she met Wit and Wan in Bangkok who persuaded her to accept Bord's offer to go to Brazil for the aforementioned purpose. The appellant also stated that she met both Wit and Wan in Singapore on arrival from Barcelona. Based on that evidence, learned counsel for the appellant contended that PW18 had carried out investigation into this case in lackadaisical manner when she failed to investigate into this aspect of the defence case. The investigating officer, learned counsel submitted, should have 'back tracked' and retraced the appellant's travel to Brazil, the hotels where she stayed in particular the room in which she swallowed the sausage like packages and made an effort to trace Bord, Wit and Wan after the appellant had provided their names in exh D126.

**[39]** The defence contention begs the question whether the appellant's evidence on these three names constituted a good and sufficient 'Alcontara Notice' which, upon the notice being given, the prosecution would be obliged to track down Bord, Wit and Wan as well as to retrace the appellant's travel to Brazil including conducting an investigation to inspect the room where she was allegedly forced to swallow the sausage like packages. It is settled in our law, for the Alcontara Notice to apply, the appellant must provide sufficient and good particulars in the right perspective and not a vague notice where the prosecution would not be able to carry out investigation to rebut the defence story or version. However, having meticulously considered the evidence, we found that the relevant information regarding these three names such as their addresses and telephone numbers were not disclosed or provided by the appellant at the earliest opportunity when she was stopped at the airport or when her cautioned statement was recorded. Similarly in exh D126, the appellant had also failed to provide any information and detail regarding these three persons to enable the police to investigate. We had been referred to the case of *Teng Howe Sing v Public Prosecutor* [2009] 3 MLJ 46; [2009] 3 CLJ 733 on this point, where the appellant failed to provide relevant information regarding 'Ho Seng', the Federal Court said:

> [30] With regard to the above contention of the appellant it is our judgment that it is misconceived. By commenting on the failure of the appellant to provide all relevant information regarding 'Ho Seng' to the police at the time of his arrest or when his cautioned statement ('D2') was recorded five days after his arrest does not mean that the learned trial judge had imposed on the appellant a duty to speak/disclose them in his cautioned statement nor did he draw any adverse inference against the appellant. The learned trial judge's comments on the late disclosure of the real identity of 'Ho Seng' at the defence stage merely goes to show the weight that the court attached to the appellant's defence which is permitted by the law. On this point we would like to refer to the case of *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585; [1987] 1 LNS 72, wherein Lim Beng Choon J at p 591 said that:
>
> > ... So we are left with nothing more than the bare oral assertion of the accused that it was Noor Azlan who asked him to collect the bag on behalf of the former

and that the accused himself had no knowledge of the contents of P3. If that be the case, one would hardly imagine that he would not have told either PW3 or PW5 at the railway station at Alor Setar at the time of his arrest that P3 belonged to Noor Azlan instead of saying that there was nothing in P3.

[31] In *Badrulsham*'s case, the court was of the view that the failure of the accused to inform the raiding officers that the white plastic bag belonged to Noor Azlan at the time of his arrest and only revealing this information during the interrogation two hours after his arrest, goes some way to support the case for the prosecution.

[32] Applying the principle in *Badrulsham*'s case to the facts of the instant case, the learned trial judge was correct to conclude that the appellant had two opportunities to provide information about 'Ho Seng', ie, at the time of his arrest and five days later during recording of his cautioned statement but he failed to do so. We are therefore of the view that in the circumstances, the appellant's failure to provide relevant information about 'Ho Seng' for the police to carry out a thorough investigation into the probability of his defence, entitled the learned trial judge to disbelieve him.

**[40]** In *Marimuthu a/l Seringan v Pendakwa Raya* [2016] MLJU 1561; [2016] 1 LNS 64 in considering the issue of the Alcontara notice the Court of Appeal said:

[32] Peguambela terpelajar berhujah bahawa 'Notis Alcontara' telah dikemukakan dengan awal. Dengan hormatnya kami tidak bersetuju. Kami tidak bersetuju bahawa satu 'Notis Alcontara' yang lengkap dan sempurna telah diberikan kepada pihak polis. Di dalam kes *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705; [1996] 1 LNS 597, fakta dalam kes itu berbeza dengan fakta dalam kes semasa terhadap perayu. Dalam kes itu, butir-butir penuh penama 'Che Mat' yang disebutkan oleh perayu dalam kes itu telah diberikan sepenuhnya di dalam percakapan beramaran yang telah dirakam dari perayu dalam kes itu, tetapi tidak di dalam kes semasa terhadap perayu.

[33] Dalam kes *Rengarajan Thangavelu v PP* [2015] 1 CLJ 993, Mahkamah Rayuan telah membuat keputusan atas isu yang sama, seperti berikut:

[10] In respect of ground: (i) we have meticulously looked into the cautioned statement. There was no sufficient information for the police to investigate the case in relation to the person 'Pandian' who the appellant says gave the drugs to him. And also there was no sufficient information of the person who the appellant says the drugs were supposed to be handed over to by him as per 'Pandian's' direction. From the decided cases, the information in the cautioned statement without sufficient information of 'Pandian' and the purported recipient is a story and is not a good 'Alcontara Notice' for placing an obligation on the part of the prosecution to rebut the same. The story if true, places the burden on the appellant to rebut trafficking on the balance of probabilities. That is to say, he may have to call 'Pandian' or the purported recipient to give evidence in support of his case. However, if he has given a good 'Alcontara Notice' the obligation will be for the prosecution to track down 'Pandian' or the purported recipient to ascertain the truth of the appellant's story to the satisfaction of the court. A bad 'Alcontara Notice' does not help the appellant at all but imposes an

obligation on the appellant to lead evidence in relation to his story to rebut trafficking, that too on a balance of probabilities. In *Phiri Mailesi (Zambian) v Public Prosecutor* [2013] 5 MLJ 780; [2013] 1 LNS 391, the Court of Appeal, through Hamid Sultan bin Abu Backer JCA on 'Alcontara Notice' had this to say:

> It is pertinent to note that the 'Alcontara Notice' must have sufficient particulars in the right perspective and not a vague notice where the prosecution will not be able to advance their investigation to rebut the defence story or version. It must also be given at the earliest opportunity at the material time of the arrest or at least upon counsel taking instruction from the accused to conduct its defence. In addition the defence's version should be put at prosecution stage and to positively evaluate the story of the accused relating to 'Alcontra Notice' before evaluating the prosecution case and applying the maximum evaluation as *Alcontara* case places the onus on the prosecution to rebut or sufficiently explain that they have discharged that onus. In the instant case evidence will show that the defence has not given an 'Alcontra Notice' in the right perspective.

**[41]** In the appeal before us the learned trial judge had made the following findings with regard to the characters of Bord, Wit and Wan:

> [48] Di sini, tiada apa-apa keterangan yang menunjukkan maklumat jelas mengenai Bord, Wit dan Wan diberikan kepada pegawai penyiasat atau pihak polis. Apa yang dinyatakan di dalam D126 adalah Bord merupakan seorang lelaki berkulit hitam yang tertuduh kenali melalui internet dan Wit dan Wan adalah perempuan warganegara Thailand.

**[42]** Based on the evidence and case authorities referred to above, we were satisfied that the defence had failed to provide sufficient and good particulars in connection with the appellant's evidence on the three individuals and the places where she had stayed whilst in Brazil that would call for investigation by the police. In the event the defence argument on this aspect of its case collapsed.

## CONCLUSION

**[43]** Each of the factor to which we had alluded, taken as a whole, was sufficiently convincing to support our conclusion that the prosecution had successfully proved all the essential elements of the offence of trafficking in the dangerous drug namely 689.1g of cocaine under s 39B(1)(a) of Act 234. The appellant in reality failed to rebut the presumption of trafficking under s 37(da) of Act 234 on the balance of probabilities. There was overwhelming evidence that had established the actual fact that the appellant had knowledge and thus possession of the impugned drug. For all these reasons, the case for the defence which was principally premised on the allegation of duress must therefore fall. The threshold of proof requires the prosecution to prove to the satisfaction of

the court, the trier of fact, of the appellant's guilt beyond reasonable doubt. The defence only needs to raise a reasonable doubt in the prosecution's case. In accordance with s 182A of the Criminal Procedure Code, we were driven to the inexorable conclusion that, after the entire comparison and consideration of all the evidence put before the court, the defence had failed to raise a reasonable doubt in the prosecution's case against the appellant. We were satisfied that the prosecution had proved its case against the appellant beyond a reasonable doubt on the charge of trafficking in the dangerous drug as specified therein under s 39B of Act 234. In the upshot, we dismissed the appeal against the conviction and sentence. The order of conviction and sentence by the High Court was consequently affirmed.

*Appeal dismissed; conviction and sentence affirmed.*

Reported by Ashok Kumar